



Original: **English**

No.: **ICC-02/05-01/20**

Date: **17 March 2022**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

PUBLIC

**Public Redacted Version of
Defence response to Prosecution’s seventh application under rule 68(3) to
introduce into evidence prior recorded testimony of witnesses P-0015 and P-0918,
ICC-02/05-01/20-614-Conf (ICC-02/05-01/20-621-Conf, 8 March 2022)**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s seventh application under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) (“Seventh Application”).¹ The Seventh Application is seeking the admission of the evidence of witnesses P-0015 and P-0918 (“Two Witnesses”) pursuant to Rule 68(3) of the Rules *in lieu* of their *viva voce* examination-in-chief and requests the Chamber to grant one hour for a supplementary *viva voce* questioning of each witness.²

2. The Defence submits that it is essential that both witnesses testify *viva voce* to ensure that the Trial Chamber obtains the best possible evidence relating to the purported identification of “*Ali Kushayb*” as Mr Abd-Al-Rahman, based on what each of the Two Witnesses independently recall.

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this Response is classified “Confidential”, mirroring the classification of the Seventh Application. A public redacted version will be filed shortly thereafter.

Adoption by reference of additional earlier submissions

4. As with its responses to the Prosecution’s six previous 68(3) requests, the Defence adopts by reference, for the record and to preserve Mr Abd-Al-Rahman’s appeal rights, the general observations made with respect to the protection of the relevant witnesses’ statements in its response to the Prosecution’s First Application made pursuant to Rule 68(3) on 5 January 2022;³ it is submitted that the same considerations apply to the Two Witnesses.

5. Furthermore, and while noting the Trial Chamber’s rejection of similar objections concerning the admissibility of the prior evidence of Witness P-0954 in its decision dated 8 February 2022⁴ and its decision dated 23 February 2022⁵, the Defence adopts by reference, for the record and to preserve Mr Abd-Al-Rahman’s appeal rights, its submissions on the absence of a valid Article 4(2) special agreement

¹ ICC-02/05-01/20-614-Conf; public redacted version [ICC-02/05-01/20-614-Red](#).

² ICC-02/05-01/20-614-Conf; public redacted version [ICC-02/05-01/20-614-Red](#), paras 1, 9, 13, 20.

³ ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 14-15.

⁴ [ICC-02/05-01/20-588-Red](#), paras 9-17.

⁵ [ICC-02/05-01/20-605](#), paras 11-12.

between the Court and non-States Parties, including Chad,⁶ where one witness, namely P-0015, may have been interviewed.⁷

The Seventh Response

6. Before turning to an analysis of the Seventh Application with respect to each of the Two Witnesses individually, the Defence adopts by reference its earlier submissions, common to all proposed Rule 68 witnesses.⁸ These pertain *inter alia* to the form of the prior recorded testimony of the Two Witnesses, the number of days over which the witnesses were interviewed, and the absence of information about any warnings given cautioning the witnesses against discussing their accounts with third parties during the process.

7. The Defence notes the Trial Chamber's rejection of its overarching objections in its confidential Decision on the Prosecution's fourth and fifth requests to introduce prior recorded testimonies under Rule 68(3), dated 21 February 2022 ("Decision").⁹ In the Decision, the Chamber summarises the Defence's four principal arguments.¹⁰ However, in finding that the issues raised by the Defence "are no more than pure speculation and are matters which may be dealt with in the normal course of cross-examination", it appears that the Chamber fundamentally misapprehends the gravamen of the Defence's position. This misapprehension is no doubt due to Defence counsel's lack of clarity, for which he apologises.

8. The Trial Chamber appears to understand the Defence submissions as having been definitive in nature: "the Defence alluded to four general issues related to the witness statement-taking process *which produce* in its view, unreliable statements and *which [...] result* in prejudice to the accused."¹¹ This was not, however, the argument. The Defence's submission, in a nutshell, was that the ways in which witness statements are taken means there is *a risk* of witness statements being unreliable.

⁶ ICC-02/05-01/20-568-Conf, public redacted version [ICC-02/05-01/20-568-Red](#), paras 5-11; ICC-02/05-01/20-576-Conf, public redacted version [ICC-02/05-01/20-576-Red](#), par. 5.

⁷ P-0015, DAR-OTP-0088-0187-R03, paras 27, 90-96.

⁸ ICC-02/05-01/20-T-022-CONF-ENG, p. 11, lines 21-25 to p. 21, line 15 (public redacted version not yet available). [ICC-02/05-01/20-576-Red](#), paras 7-11.

⁹ [ICC-02/05-01/20-602-Red](#), paras 13-15.

¹⁰ [ICC-02/05-01/20-602-Red](#), paras 8-12.

¹¹ [ICC-02/05-01/20-602-Red](#), para. 8.

Since there are no means by which, realistically, these risks can be explored in cross-examination, the principle of precaution militates in favour of the statements of those witnesses who have been identified by the Defence not being allowed to stand wholly or partly as their evidence-in-chief pursuant to Rule 68(3).

9. The Trial Chamber dismissed the Defence's submissions as being "no more than speculation". It is respectfully submitted, however, that allowing a lengthy witness statement to stand as a witness's evidence-in-chief by definition implies relying on a statement made in response to uncontrolled questioning. This is neither speculative nor a matter of risk. It is a matter of fact that no-one was present to control the way the investigator(s) questioned the witnesses or to observe the way in which improper questions may have impacted on the witnesses' answers. There is *a risk* that improper questions were asked. It is undeniable that nobody knows and nobody can know whether investigators in the field *have in fact* elicited unreliable evidence, for example, through the use of leading questions.¹² In any case, the judicial process and the principle that the Chamber is in a position to assess the reliability of the witnesses' testimony has nothing to do with the degree of trust to be placed in the competence and integrity of the Prosecution's investigators. The issue is about creating the conditions that best allow the Chamber to fulfil its role in assessing the reliability of witness evidence.

10. It is not speculation to point out that nobody knows and nobody can know whether investigators have in fact elicited unreliable evidence through, for example, the use of leading questions. It is in any event no more and no less speculative for the Defence to say that, given all the circumstances, there is *a risk* that a statement contains the fruit of improperly leading questions, as it would be for the Prosecution – or anyone else – to argue that a statement is *not* tainted by leading questions. We simply do not know, and it would be throwing caution to the wind to permit the witness statement to be introduced under Rule 68(3).

11. The potential negative impact of any such lack of precaution is compounded when one considers the vulnerability of many Prosecution witnesses, particularly

¹² ICC-02/05-01/20-T-022-CONF-ENG, p. 14, lines 10-11.

those with little or no experience of formal education. This issue of the vulnerability of witnesses was addressed by the Defence during submissions,¹³ after having first been alluded to by the Presiding Judge herself:

What isn't really covered in the report are matters such as what the education is like in, particularly, rural areas of Sudan¹⁴

[...]

And so I really do think it's important that we get some idea of what particularly, as I say, witnesses who come from a village background or the like are likely to deal with leading questions in cross-examination or indeed in examination-in-chief, which is not unknown, of direct examination.¹⁵

12. The Chamber demonstrated its awareness of that risk when it asked the Prosecution and the Defence to instruct a joint expert on this very point.

13. This issue of vulnerability caused by low rates of exposure to formal education is amply demonstrated in Prosecution witness statement after witness statement. Such demonstration was reinforced by details provided in the report of the proposed joint expert, Alex de Waal.¹⁶ Pre-conflict, less than a third of Darfuri children were enrolled in primary school; just over 1 in 10 were enrolled in secondary school. It is respectfully submitted that this is a matter of fact, not of speculation.

14. Similarly, there is *a risk* that a witness who provides her or his account over the course of several days will discuss the process, the questions asked and answers given with others at the end of each day's interview. That risk is reduced when a witness testifies entirely *viva voce* in court. The Defence is not in a position to assert, of course, that this in fact occurred in respect of some or all of the Prosecution's witnesses. It is in no more and no less speculative for the Defence to say that, given all the circumstances, there is *a risk* that a statement is adulterated – wittingly or unwittingly – by the influence of third parties than it would be for the Prosecution – or anyone else – to argue that a statement *is not* so adulterated. We simply do not

¹³ ICC-02/05-01/20-T-022-CONF-ENG, p. 16, line 10 *et seq.*

¹⁴ ICC-02/05-01/20-T-022-CONF-ENG, p. 4, line 10 *et seq.*

¹⁵ ICC-02/05-01/20-T-022-CONF-ENG, p. 4, line 23 *et seq.*

¹⁶ ICC-02/05-01/20-T-022-CONF-ENG, p. 4, line 23 *et seq.*

know. It would once again be throwing caution to the wind to permit the witness statement to be introduced under Rule 68(3).

15. In addition to the finding that the Defence's submissions were "no more than speculation", the Trial Chamber decided that they "are matters which may be dealt with in the normal course of cross-examination". The Defence spent some time explaining the practical limits of that possibility.¹⁷ Whilst a footnote in the Decision cites to the Defence's submissions, the Decision does not appear to engage with the submissions or in any way conclude that they are unfounded.

16. The Defence reiterates its argument that it would be illusory to expect a vulnerable witness to be able to recall whether or not a particular feature of her or his witness statement was provided as a result of a leading question (even assuming she or he could understand what a leading question was), or whether or not she or he equivocated or hesitated before providing an answer during an interview, or the identity of the person or persons with whom she or he spoke between the days' interviews, and what they spoke about. These points are all the more acute when it is acknowledged that the witness statements have often been taken very many years ago: [REDACTED]. Respectfully, these are simply not matters which realistically may be dealt with in the normal course of cross-examination, or that "may still be examined when the witness appears in Court."¹⁸

17. Further, the Defence notes that the Chamber suggests that "these factors can also be considered by the Chamber when it assesses the probative value and weight to be given to these testimonies in the context of its judgment under Article 74 of the Statute."¹⁹ The Defence would submit, however, that this approach would amount to shutting the barn door after the horse has bolted. By the time the Trial Chamber is in deliberations, it will have before it potentially dozens of witness statements and transcripts of interviews all of which will have been allowed to stand as witnesses' direct evidence under Rule 68(3). For the reasons set out in the paragraphs above, it is fanciful to expect that the Defence will have been able to adduce testimony in

¹⁷ ICC-02/05-01/20-T-022-CONF-ENG, p. 14, line 23 *et seq.*

¹⁸ [ICC-02/05-01/20-602-Red](#), para. 14.

¹⁹ [ICC-02/05-01/20-602-Red](#), para. 14.

cross-examination that will demonstrate conclusively, for example, that answers were given to leading questions, or were originally more ambiguous, or represented the pooling of multiple individuals' recollections. The inevitable consequence, therefore, is that potentially unreliable statements will be introduced into the trial record, for reasons of expediency, to the great prejudice of Mr Abd-Al-Rahman.

18. The only way to forestall such an eventuality is to apply the principle of precaution so that these, as well as any future proposed Rule 68(3) witnesses, are required to give their evidence-in-chief *viva voce*.

19. With regard to its overarching arguments related to evidence of the alleged identity and individual criminal responsibility of Mr Abd-Al-Rahman, the Defence takes note of the Trial Chamber's finding in the Decision that "*the Rome Statute [...] and Rule 68(3) of the Rules clearly foresee the introduction of prior recorded testimony for fact witnesses and on issues concerning the acts and conducts of the accused*"²⁰, citing its earlier decision of 8 February 2022²¹. As previously stated, the Defence acknowledges this finding but urges the Trial Chamber to exercise its discretionary power when assessing on a case-by-case basis requests for introduction of evidence pursuant to Rule 68(3)²² and more particularly, evidence pertaining to the hotly contested issue that is the identification of Mr Abd-Al-Rahman as "*Ali Kushayb*". In this respect, the Defence notes that in its two earlier decisions, the Trial Chamber rejected the Prosecution's requests in part and deemed it preferable to hear the evidence of two witnesses (P-0843 and P-0954) and one witness (P-0884), respectively, *viva voce* on the ground that they provided "unique" evidence and, for the first two, due to their particularly close interaction with "*Ali Kushayb*".²³

20. While noting the Trial Chamber's earlier position that the issue of the alias "*is not, as suggested by the Defence, 'the heart of the Prosecution case', as reflected in the Trial*

²⁰ [ICC-02/05-01/20-602-Red](#), par. 7.

²¹ [ICC-02/05-01/20-588-Red](#), par. 8.

²² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the "Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088", [ICC-02/11-01/15-950-Red](#), 6 June 2017, par. 90.

²³ [ICC-02/05-01/20-588-Red](#), paras 72, 78; [ICC-02/05-01/20-602-Red](#), paras 35, 36.

*Brief submitted before the Chamber*²⁴, the Defence recalls its submission that this issue constitutes the heart and the first and foremost aspect of its case²⁵. If the Prosecution fails to establish the link between Mr Abd-Al-Rahman and “*Ali Kushayb*” beyond reasonable doubt, Mr Abd-Al-Rahman will be entitled to an acquittal on all charges. Therefore, the Defence submits that it must be allowed full and unrestricted opportunity to examine and challenge evidence of the alleged alias. In order to do so, all witnesses called by the Prosecution to establish that link should be required to be examined-in-chief *viva voce*, without giving the Prosecution the possibility to introduce their prior written statements as direct evidence. It would be incautious to allow prior statements collected in conditions which cannot be verified and that raise numerous reasons to query their reliability, as set out in the previous Defence’s responses to the 68(3) requests. This applies to the Two Witnesses.

P-0015

21. The Defence requests that P-0015 be called to testify *viva voce* for the following reasons. The nature and content of P-0015’s prior witness statement and associated items, identified in Annex A (A1) of the Request, relate *inter alia* to the identity and alleged position of a man known to the witness as “*Ali Koshib*” and his alleged role in uncharged crimes in Mukjar in December 2003.²⁶ The witness purports to describe “*Ali Koshib*” based on various sightings in Garsila and Mukjar in December 2003.²⁷ Based on “common knowledge” and personal belief, the witness describes the man known to him as “*Ali Koshib*” as an *agid* and the “leader of the Janjaweed from Mukjar to Garsila”.²⁸ In this regard, the Defence notes that the witness’ basis of knowledge for identifying Mr. Abd-al-Rahman as “*Ali Kushayb*” is one of the issues that the Prosecution seeks to raise in the context of a supplementary examination.²⁹ He further purports to describe an encounter between “*Ali Koshib*” and Ahmed

²⁴ Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-588-Conf; public redacted version [ICC-02/05-01/20-588-Red](#), 8 February 2022, para. 58.

²⁵ [ICC-02/05-01/20-601-Red](#), par. 10.

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ ICC-02/05-01/20-614-Conf; public redacted version [ICC-02/05-01/20-614-Red](#), par. 14.

Haroun, then Minister of the Interior, in the presence of *Asakir* and Janjaweed, in December 2003.³⁰

P-0918

22. The Defence requests that P-0918 be called to testify *viva voce* for the following reasons. The nature and content of P-0918's prior witness statement and associated items, identified in Annex A (A2) of the Request, relate in most relevant part to the identity, background, and physical description of a man understood by the witness to be "*Ali Kushayb*"³¹, and his alleged role in the charged Kodoom crimes.³² The witness claims he identified the man as "*Ali Kushayb*", essentially on the basis of common knowledge, outside his pharmacy and at the market in Garsila³³ and at the Mukjar market in August 2003 while riding a car with Janjaweed.³⁴ [REDACTED]³⁵ The Defence notes that the Prosecution seeks to explore the witness' basis of knowledge for identifying Mr. Abd-Al-Rahman as "*Ali Kushayb*" in its limited supplementary examination.³⁶

23. The Defence finally notes that Witness P-0918 states that [REDACTED],³⁷ and recalls that a relative lack of formal education is a manifestation of vulnerability. In this case, the Defence would submit that [REDACTED]. As a result, the Defence submits that the prior evidence collected from P-0918 carries a greater risk of presenting an altered account of the events, as opposed to accounts which would be elicited in court through a traditional examination-in-chief, and which would be time-consuming to explore in the context of a specific and targeted cross-examination.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

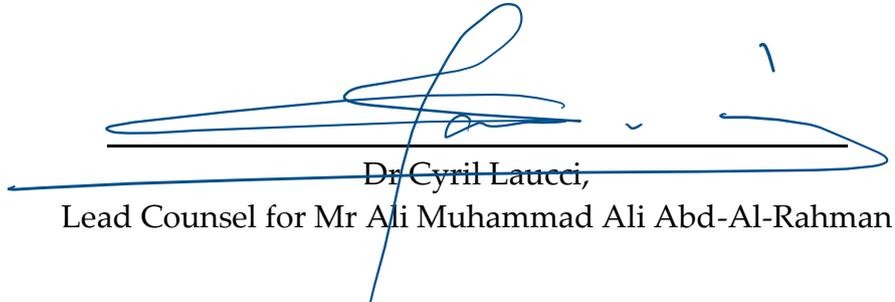
³⁵ [REDACTED].

³⁶ ICC-02/05-01/20-614-Conf; public redacted version [ICC-02/05-01/20-614-Red](#), par. 21.

³⁷ [REDACTED].

THEREFORE, THE DEFENCE HEREBY REQUESTS THAT THE CHAMBER DISMISS the Seventh Application with regard to the admission of the prior recorded testimony of Witnesses P-0015 and P-0918

AND FIND that they should both testify entirely *viva voce*.



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 17th day of March 2022 at The Hague, The Netherlands